STATE OF DELAWARE
THE COURTS OF THE JUSTICES OF THE PEACE
820 NORTH FRENCH STREET, 11TH FLOOR
WILMINGTON, DELAWARE 19801

NORMAN A. BARRON
CHIEF MAGISTRATE

TELEPHONE: (302) 571-2485

LEGAL MEMORANDUM 80-26 (REVISED)

TO: ALL JUSTICES OF THE PEACE
STATE OF DELAWARE

FROM: NORMAN A. BARRON
CHIEF MAGISTRATE

DATE: MAY 21, 1981

RE: AUTOMATIC STAY PROVISION OF UNDER THE FEDERAL BANKRUPTCY ACT

11 U.S.C., §362 is the Automatic Stay Provision of the Bankruptcy Act. Basically, this section provides that the filing[1] of a voluntary, joint or involuntary petition for bankruptcy operates as a stay of the commencement or continuation, including the issuance of process, of a judicial proceeding against the debtor that was or could have been commenced before the commencement of the bankruptcy case, or to recover a claim against the debtor that arose before the commencement of the bankruptcy case. The filing of such a petition also operates as a stay of the enforcement, against the debtor or against property of the estate,

[1]The intent to file a Petition For Bankruptcy is immaterial. It is the actual filing of same which is relevant.

of a judgment obtained before the commencement of the bankruptcy case. Further, the filing of such a petition will act as a stay of any act to create, perfect, or enforce against the debtor's property any lien to the extent that such lien secures a claim that arose before the commencement of the bankruptcy case. Moreover, the filing of such a petition will act as a stay of any act to collect, assess, or recover a claim against the debtor that arose before the bankruptcy case commenced.

I conclude that the broad language of the stay provision encompasses within its scope any Justice of the Peace case which involves, among other forms of action, a debt action, a trespass action, a replevin action, an action to recover back rent, a distress action and attachments, executions, levies and judgments regarding the above. In short, any action where property or money of the debtor is being sought. I include within the scope of the stay provision a Summary Proceeding for Possession brought under Chapter 57 of Title 25 of the Delaware Code.[2]

If the plaintiff, lien holder or judgment creditor of actions stayed by virtue of the stay provision, requests relief from the automatic stay from the Bankruptcy Court, after notice and a hearing, the Bankruptcy Court shall grant relief from the stay, such as by terminating, annulling, modifying or conditioning such stay:

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[2]See In the Matter of R.R.S., Inc., Debtor, 7 B.R. 870 (M.D.Fla. 1980), a copy of which is attached hereto.

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property, if --

(A) the debtor does not have an equity in such property; or

(B) such property is not necessary to an effective reorganization.

In any such hearing before the Bankruptcy Court, the party requesting relief has the burden of proof on the issue of the debtor's equity in the property, while the party opposing such relief has the burden of proof on all other issues.

You should be aware, also, that the Bankruptcy Court shall grant relief from the stay, without a hearing, as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and hearing.

If a party in interest does not request relief from the automatic stay, said stay of any of the above-mentioned civil actions against the debtor continues until the earliest of:

(1) the time the bankruptcy case is closed;

(2) the time the bankruptcy case is dismissed; or

(3) with certain types of bankruptcy cases, the time a discharge is granted or denied.

Finally, you should be aware that the filing of a bankruptcy petition does not operate as a stay of the commencement or continuation of any criminal action or proceeding against the debtor.

Should an attorney notify you that he has filed a Petition For Bankruptcy on behalf of his client who is a civil defendant or judgment debtor or one whose wages have been attached, etc., or should the party himself so notify you, you should tell him that the Justice of the Peace proceeding shall be stayed as soon as the applicable Justice of the Peace Court receives verification of the fact that a Petition For Bankruptcy has been filed. Receipt by the applicable Justice of hte Peace Court of a copy of the Petition For Bankruptcy from the party seeking the bankruptcy or from his attorney shall constitute sufficient verification. Once verification is received, immediate steps should be taken by the Justice of the Peace Court to notify all interested parties to the case that the Justice of the Peace proceeding has been stayed pursuant to section 362 of the Bankruptcy Act.

If an interested party contacts you with questions concerning the automatic stay, you may recite for them their rights under the Bankrupcy Act as are set forth in this Legal Memorandum, or simply refer the interested party to the Bankruptcy Court wich is located at the J. Caleb Boggs Federal Building, 844 King Street, Wilmington, telephone number (302) 573-6174.

NAB:pn

Attachment

cc: The Honorable Daniel L. Herrmann
The Honorable William Marvel
The Honorable Albert J. Stiftel
The Honorable Robert H. Wahl
The Honorable Robert D. Thompson
The Honorable Alfred Fraczkowski
The Honorable Richard S. Gebelein
The Honorable Lawrence Sullivan
The Honorable William J. O'Rourke
The Honorable Richard J. McMahon, State Prosecutor
Harold Schmittinger, Esquire, Pres., Delaware State Bar Assoc.
Professor William J. Conner, Delaware Law School
Christine M. Harker, Esquire, Criminal Justice Planning Comm.
John R. Fisher, Director, Administrative Office of the Courts
Law Libraries: New Castle, Kent and Sussex Counties
Files

parties effected by the stay, apply with some exception to both Chapters even though the two Chapters were designed to achieve vastly different purposes. Although Chapter 11 was designed to effectuate a total reorganization of a large business and to that extent, is simply a modernized and updated version of the pre-Code Chapter X corporate reorganization proceeding, it also expressly authorizes "liquidation" plans. Thus, unlike a business reorganization under Chapter X of the Bankruptcy Act of 1898, the Bankruptcy Code now expressly permits a plan under Chapter 11 which contemplates a sale of all, or substantially all, of the property of the estate, thus a liquidating plan at the outset. § 1123(a)(5)(D), 11 U.S.C. § 1123(a)(5)(D); H.Rep. 95-595, 95th Cong. 1st Sess. at 406 (1977), U.S.Code Cong. & Admin.News 1978, p. 5963; S.Rep.95-989, 95th Cong. 2d Sess. at 118, U.S.Code Cong. & Admin.News 1978, p. 5787 (1978).

The plan proposed by these debtors, contemplates the sale of the subject real property and using the equity realized from the sale to fully satisfy the holders of unsecured claims after paying off in full the first and second mortgagees.

The fact that these Debtors have an interest in other property which is presently involved in a probate proceeding is without great significance, especially in light of the fact that the property is charged with a trust interest and may ultimately be assessed with an additional tax claim by the IRS. Thus, whether or not funds could be realized from the sale of the property tied-up in probate is without significance because it is doubtful that the proceeds would be sufficient to pay the unsecured creditors and certainly would not be sufficient to pay off the secured creditors.

In light of the foregoing, this Court is satisfied that under § 362(d)(2) these debtors did establish that they have an adequate equity cushion in the subject property which provides adequate protection to the secured creditor. In addition, these Debtors have shown that the property in question is necessary to effectuate a Chapter 11 liquidation plan inasmuch as other potential assets of these Debtors, not subject to the jurisdiction of this Court at present, could not be utilized to fund the proposed plan.

Having concluded that the Savings & Loan is not entitled to relief from stay at present, this leaves for consideration the question of how long this creditor can be held at bay and under what terms and conditions should the automatic stay be extended.

[5] In light of the past history of this case, the Debtors' delay and apparent unwillingness to undertake any meaningful steps to liquidate this asset, the Court is satisfied that it is equitable to set a firm deadline for the liquidation of this asset. Accordingly, unless the property is sold within 90 days from December 22, 1980, the Savings and Loan should be permitted to complete its foreclosure action and the automatic stay shall be lifted upon ex parte application.

A separate final judgment will be entered in accordance with the foregoing.

In the Matter of R. R. S., INC., Debtor.

STRASSER, INC., Plaintiff,

v.

R. R. S., INC., Defendant.

Bankruptcy No. 80-1571-C.

United States Bankruptcy Court, M. D. Florida, Tampa Division.

Dec. 29, 1980.

On a landlord's petition for declaratory relief and modification of stay, the Bankruptcy Court, Alexander L. Paskay, C. J., held that automatic stay provision of code

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Motion granted; jud
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1. Bankruptcy ⇐217(4)

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2. Bankruptcy ⇐217(4)

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Robert H. Schultz, Bra
plaintiff.

Chris C. Larimore, Bra
defendant.

ORDER ON MOTI
SUMMARY JUDG

ALEXANDER L. PASK

THE MATTER under c
pleading entitled "Petition
Relief and Modification
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does protect debtor's naked right of possession of premises, lease of which has been terminated, but for very limited time only, in that automatic stay continues in effect and protects naked right of possession but does not have any bearing on continued viability of lease agreement, and once lease is terminated prior to intervention of bankruptcy, landlord–tenant relationship is gone regardless of protection of right to possession.

Motion granted; judgment in accordance with opinion.

1. Bankruptcy ⇐217(4)

Automatic stay provided by the code is one of most fundamental debtor protection devices provided, and the scope of the protection is broad and was designed to reach all proceedings. Bankr.Code, 11 U.S.C.A. § 362(e).

2. Bankruptcy ⇐217(4)

Automatic stay provision of code does protect debtor's naked right of possession of premises, lease of which has been terminated, but for very limited time only, in that automatic stay continues in effect and protects naked right of possession but does not have any bearing on continued viability of lease agreement, and once lease is terminated prior to intervention of bankruptcy, landlord–tenant relationship is gone regardless of protection of right to possession. Bankr.Code, 11 U.S.C.A. §§ 362(e), 363, 365(b)(1)(A, B, C).

Robert H. Schultz, Bradenton, Fla., for plaintiff.

Chris C. Larimore, Bradenton, Fla., for defendant.

ORDER ON MOTION FOR SUMMARY JUDGMENT

ALEXANDER L. PASKAY, Chief Judge.

THE MATTER under consideration is a pleading entitled "Petition for Declaratory Relief and Modification of Stay." The pleading, treated as a complaint, was filed by Strasser, Inc. (Strasser) against R.R.S., Inc. dba Sweet Water Cafe & Pub (RRS). Strasser seeks a declaration by this Court that a certain lease between Strasser and RRS was effectively terminated prior to the Debtor's filing a petition in this Court and also seeks a vacation of the automatic stay in order to permit Strasser to complete an eviction proceeding against RRS, an action which is now pending in a state court, but now stayed by the automatic stay imposed by § 362(e) of the Bankruptcy Code. The matter came on for Preliminary Hearing scheduled pursuant to § 362(e) of the Bankruptcy Code. Although no testimony was presented at the hearing, the record reveals the following undisputed facts:

On July 12, 1979, Strasser, the owner of certain real property located in Manatee County, Florida, entered into a lease agreement with RRS and leased the premises involved in this controversy for a five year term commencing on the 15th day of July, 1979. The lease provided inter alia in ¶ 5 that the failure of the tenant to pay rent constitutes a default and that in the event of a default in any of the provisions set forth in the lease, the landlord has an option to give written notice to the lessee, and if the tenant fails to cure the default within three days from the date of the notice, the landlord will be entitled, at its election, to cancel and terminate the lease; remove all persons and property from the premises by summary procedures and pursue such other remedies as may be permitted by law. The lease also provides that all the remedies are separate and cumulative.

It is further without dispute that on August 28, 1980, counsel for the landlord notified RRS in writing that unless the default of RRS by virtue of nonpayment of rent is cured and the arrearage in the rent is paid within three days, RRS is to vacate the premises forthwith or face summary proceedings. The record further reveals that shortly after receiving the notice Strasser filed a summary distress proceeding in the County Court in Manatee County and on October 14, 1980, the county judge entered a final judgment in favor of Strasser and

against RRS and awarded possession of the premises to Strasser. The final judgment provided that in the event the premises are not vacated forthwith, the clerk shall issue a writ of possession to be executed by the sheriff. The final judgment also awarded a money judgment in the amount of $1,768 together with costs and attorney's fees in favor of Strasser and against RRS.

By virtue of the intervention of the bankruptcy proceeding, the sheriff holding the unexecuted writ of possession refused to proceed with the eviction action due to the uncertainty of whether or not the automatic stay imposed by § 362(e) would prohibit any further action against RRS.

It is the contention of the plaintiff, Strasser, that the lease was effectively terminated prior to the intervention of the bankruptcy, therefore, RRS no longer has any cognizable legal or equitable rights under the lease and, therefore, the automatic stay affords no protection to the debtor and Strasser should be permitted to proceed to complete the eviction proceeding and enforce the judgment of the county court notwithstanding the intervention of bankruptcy. On the other hand, RRS contends that the lease was never terminated and under the applicable provisions of the Bankruptcy Code, it should be entitled to the continuing protection accorded to debtors by § 362(e) and that it would be entitled to either assume or reject the lease, admittedly with the proviso that it will cure the default in the event it decides to assume the lease. § 365(b)(1)(A), (B), (C) of the Bankruptcy Code.

[1] The automatic stay is one of the most fundamental debtor protection devises provided by the Code. There is no doubt that the scope of the protection is broad and was designed to reach all proceedings. The question of whether or not was the lease effectively terminated prior to the intervention of bankruptcy and if it was, is a mere naked possession an interest which would be protected by the automatic stay of § 362 of the Bankruptcy Code.

In *In re G. S. V. C. Restaurant Corp.*, 3 B.R. 491, 2 CBC 2d 727 (Bkrtcy.S.D.N.Y. 1980), the Court found that even where a warrant of eviction was obtained for a lease terminated prior to the intervention of bankruptcy proceedings, the Debtor still enjoyed a *de facto* right of possession which was an equitable interest with a "sufficient nexus to invoke the protection of the automatic stay." *Id.* at 730. The Court went on to hold, however, that the stay should be lifted inasmuch as the debtor's delaying tactics combined with lack of adequate protection warranted judgment for the creditor. The fact that the automatic stay gives limited and temporary protection to a holdover tenant debtor based solely on naked possession does not mean that there is a viable executory contract which the debtor can assume under § 363 of the Bankruptcy Code. There are numerous cases which have dealt with the question of a debtor's ability to assume a lease which was either terminated or had expired prior to the intervention of bankruptcy. The courts have been uniform in concluding that once a lease is terminated, other than by an *ipso facto* forfeiture clause, it cannot be given new life and the court is certainly not in a position to rewrite the terms of a new lease. *In re Schokbeton Industries, Inc.*, 466 F.2d 171 (5th Cir. 1972); *In re James Beck dba J. C. Penney's Beauty Salon*, 5 B.R. 169, 6 BCD 1119 (Bkrtcy.D.Haw.1980); *Thompson v. Texas Mexican R. R.*, 328 U.S. 134, 66 S.Ct. 937, 90 L.Ed. 1132 (1946); V. Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn.L.Rev. 439 (1973); V. Countryman, *Executory Contracts in Bankruptcy: Part II*, 58 Minn.L.Rev. 749 (1974). Professor Countryman in his article writes that when lease agreements have been terminated, they cease to become assumable because once the agreement is terminated, there is no executory agreement. In a recent decision which involved the same question, the court held that where lease agreements were validly terminated, tenants were holding over and no executory interest was available for debtors-in-possession to assume, therefore, sufficient cause existed to lift the stay). *In re Mimi's of Atlanta, Inc.*, 5 B.R. 623 (Bkrtcy.N.D.Ga.

1980); *cf. In re Fountainbleau*, 515 F.2d 913 (5th Cir. 1975).

[2] In light of the foregoing, this Court is satisfied that the automatic stay provision of § 362(e) of the Bankruptcy Code does protect the debtor's naked right of possession of the premises, but for a very limited time only. *In re G. S. V. C. Restaurant Corp.*, *supra*. This is so because the fact that the automatic stay continues in effect and protects the naked right of possession, it does not have any bearing on the continued viability of a lease agreement. Once the lease is terminated prior to the intervention of bankruptcy, the landlord-tenant relationship is gone regardless of the protection of the right to possession. As stated by Judge Brown in *Schokbeton*, *supra* the

> "Debtor's rights . . . evaporated upon receipt of the written notice of termination, and neither the mere filing of the arrangement petition, nor the referee's order purporting to extend the grace period for cure of the default nor a mystical combination of both could effect their recondensation." *Id.* at 176.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the oral motion for summary judgment made on behalf of Strasser, Inc. be, and the same hereby is, granted. A separate final judgment will be entered in accordance with the foregoing.

DONE AND ORDERED at Tampa, Florida on December 29, 1980.

In the Matter of Phyllis Rae ESTRIDGE
fka Phyllis Rae Freda, Debtor.

Bankruptcy No. 80-680 C.

United States Bankruptcy Court,
M. D. Florida,
Tampa Division.

Dec. 29, 1980.

Upon trustee's objection to property claimed as exempt in Chapter 7 case, the Bankruptcy Court, Alexander L. Paskay, C.J., held that debtor, who was a single woman who had been divorced from her second husband since 1978, who was living with her two minor children from her first marriage at time of filing of petition, who received child support from her first husband who claimed the children as his dependents in tax returns, who received alimony from her second husband and who recently remarried for the third time, was not "head of the family" within meaning of Florida Constitution; thus, debtor was not entitled to personal property homestead exemption provided by Florida Constitution.

Ordered in accordance with opinion.

Bankruptcy ⇐396(5)

Debtor, who was a single woman who had been divorced from her second husband since 1978, who was living with her two minor children from her first marriage at time of filing of petition, who received child support from her first husband who claimed the children as his dependents in tax returns, who received alimony from her second husband and who recently remarried for the third time, was not "head of the family" within meaning of Florida Constitution; thus, debtor was not entitled to personal property homestead exemption provided by Florida Constitution. Bankr. Code, 11 U.S.C.A. §§ 522(d), 701 et seq.; West's F.S.A.Const. Art. 10, § 4.

See publication Words and Phrases for other judicial constructions and definitions.

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NORMAN A. BARRON
CHIEF MAGISTRATE

TELEPHONE (302) 571-2485

LEGAL MEMORANDUM 80-26 (SUPPLEMENT)

TO: ALL JUSTICES OF THE PEACE
STATE OF DELAWARE

FROM: NORMAN A. BARRON
CHIEF MAGISTRATE

Rescinded
5-7-99

DATE: AUGUST 20, 1984

RE: AUTOMATIC STAY PROVISION UNDER THE FEDERAL BANKRUPTCY ACT

As you know, §362(b) (1) of the Bankruptcy Act provides that the filing of a petition in bankruptcy does not operate as a stay regarding the commencement or continuation of any criminal action or proceeding against the debtor.[1] See Legal Memorandum 80-26 (Revised), dated May 21, 1981. A question has arisen regarding the proper interpretation of §362(b) (1). The question can best be analyzed under the factual situation of an actual case which arose in Delaware:

A representative of a business obtained a warrant for the arrest of one Marvin Davis, Jr., on April 13, 1981. The warrant charged Davis with violation of 11 Del.C., §900, Issuing a bad check. On April 14, 1981, Davis filed a petition in bankruptcy

[1] 11 U.S.C., §362(b) (1) states, "(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay -- (1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor."

with the Bankruptcy Court. Thereafter, other charges of Issuing a bad check were brought by two other businesses. Davis was brought before a Justice of the Peace who advised the defendant of his right to elect trial in the Court of Common Pleas. Davis elected the Court of Common Pleas as the trial forum.

The alleged bad checks were payments on the kind of debts dischargeable in a bankruptcy proceeding. Each creditor (each of the three victims of the bad check charges), received notice from the Bankruptcy Court of his right to file, within specified times, either a complaint objecting to Davis' discharge or a complaint requesting a determination of the dischargeability of his claim. No complaints were filed and the defendant was granted a discharge on July 28, 1981.

Davis sought a permanent injunction in the Bankruptcy Court against the prosecution in any Delaware State court of the criminal charges against him. The Attorney General agreed to stay the criminal prosecution until the issue was settled. Before Bankruptcy Judge Helen Balick, Davis argued that the three creditors were attempting to impair the jurisdiction of the bankruptcy court by using the criminal law to collect a debt discharged in a bankruptcy proceeding. He pointed out that if he were convicted under 11 Del.C., §900, the sentencing court, in addition to discretionary punishment under 11 Del.C., §4206(a), must order the defendant to make restitution to the person to whom the bad check was issued.[2]

[2] 11 Del.C., §4206(a) states: "(a) The sentence for a class A misdemeanor shall be fixed by the court and shall not exceed 2 years imprisonment and such fine or other conditions as the court may order; provided, however, that the court shall require a person convicted of issuing a worthless check under §900 of this title to make restitution to the person to whom the worthless check was issued."

He contended that the mandatory restitution requirement of 11 Del.C., §4206(a) caused the Court of Common Pleas actions to be civil in nature; the actions are automatically stayed by 11 U.S.C., §362(a); and since none of the victims sought a determination of non-dischargeability, the discharge order prohibits these creditors from pursuing the criminal actions. Bankruptcy Judge Balick denied Davis' request for a permanent injunction, stating as follows:

> "The State Legislature has decided that the issuance of a check with knowledge that it will not be honored by the drawee is a misdemeanor. Neither the fact that a private individual may prosecute nor that restitution must be ordered upon conviction alters the kind of proceeding pending in the state court. Consequently, the state court proceedings are criminal actions which are removed from the effect of the automatic stay by §362(b) (1).
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> . . . Davis argues that this court should issue a permanent injunction under its broad equitable powers so that the individual creditors cannot accomplish through the criminal justice system what they are now prohibited from doing civilly, i.e. the collection of their claims.
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> The other side of the coin is -- should the State be prevented from enforcing its criminal law because of the mandatory restitution requirement.
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> Each criminal action was filed before that creditor had received notice of the bankruptcy filing. The mandatory restitution aspect of 11 Del.C., §4206(a) was the principal reason each individual creditor filed a criminal complaint. There was no showing that these creditors intended to subvert the bankruptcy law nor that any state official has not or would not properly perform his duties under the law. There is only the specter of restitution until the state has proven beyond a reasonable doubt that Davis is guilty. If there is a guilty verdict, restitution would be part of a judgment of conviction -- the penalty for violating the law. No debt nor debtor/creditor relationship would be created. Davis could not be sued. Any failure to comply with the sentence would be either a violation of probation or contempt.

Although Congress has given bankruptcy courts power and authority to issue any order necessary or appropriate to carry out the provisions of title 11 of the United States Code (11 U.S.C., §105, 28 U.S.C., §1481), it did not confer any criminal jurisdiction. Its enactment of §362(b) (1) clearly reflects a strong policy against federal interference with state court criminal prosecutions and is consistent with the policy of making bankruptcy available to financially pressed individuals but not a shelter from the consequences of criminal acts.

A court that has no criminal jurisdiction should rarely, if ever, issue a permanent injunction against the enforcement of the criminal law. The issuance of a bad check with knowledge is a criminal act. The mere possibility that a creditor may recover all or part of a discharged debt only after a debtor's conviction does not thwart the purposes of the bankruptcy laws. The plaintiff's request for a permanent injunction must be denied." In the Matter of Davis, 15 B.R. 442, 443 (D.Del. 1981).

Thereafter, Davis took an appeal before the District Court of the District of Delaware. Judge Stapleton affirmed the Bankruptcy Court's decision, observing that:

"The bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension. Thus, criminal actions and proceedings may proceed in spite of bankruptcy."

At the same time, Judge Stapleton recognized a possible constitutional infirmity with the restitution provision of 11 Del.C., §4206(a):

"Plaintiff . . . argues that the intentions of the creditors who filed these actions and who prosecuted them in Justice of the Peace Court until their removal to the Court of Common Pleas are decisive. Under [Davis'] theory, if a creditor initiates a criminal prosecution for the purpose of obtaining a preference from a bankrupt debtor, the prosecution should be enjoined because it threatens the integrity of the bankruptcy laws. In the first place, this test would be difficult to apply, and would involve the court in matters entirely unrelated to the discharge of the debtor. More significantly, however, the State -- wisely

or not -- has authorized such prosecutions. And in this case, the only one before me for decision, the State has assumed control of the prosecutions itself. At this point, all of the interests identified in Younger[3] are present in this case.
. . .

A remaining question is whether the State court provides a forum in which [Davis] may raise the federal rights [he has] asserted here. The State maintains that the mandatory restitution provision, 11 Del.C., §4206(a), gives the sentencing judge no discretion, and that he or she must award restitution in the cases involving Mr. . . . Davis. The issue, however, is not discretion, but the effect of the discharge in bankruptcy and the Supremacy Clause of the United States Constitution. The essence of [Davis'] position is that 11 Del.C., §4206(a) cannot constitutionally be applied to this situation because, to do so, would defeat two fundamental objectives of the Bankruptcy Act: the rehabilitation of the debtor through a 'clean slate discharge, and the equitable distribution of assets among similarly situated creditors.' Isofar as [Davis seeks] to avoid an order of restitution, as opposed to complete immunity from prosecution, [his] position raises substantial Supremacy Clause issues.[4]

[Davis'] argument, however, is one which can and should be made in the first instance to the Court of Common Pleas and, if necessary, on appeal from its judgment. The opportunity to urge this argument in the state proceedings is adequate under the test enunciated in Garden State Bar Ass'n v. Middlesex County Ethics Comm., 643 F.2d 119 (3d Cir.), reh. denied, 651 F.2d 154 (3d. Cir.), cert. granted, ___ U.S. ___, 102 S.Ct. 500, 70 L.Ed.2d 377 (1981).
. . .

Nor is this an exceptional case requiring immediate federal intervention. As noted, there

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[3]Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

[4]Art. VI of the United States Constitution states: "This Constitution, and the Laws of the United States which shall be made in Pursuant thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

> are two federal policies embodied in the Bankruptcy Code, which the criminal prosecutions against Mr. . . . Davis implicate. These federal interests, although important, do not warrant immediate injunctive relief. There is no reason to believe that Congress intended the discharge provision of the Code to confer an immunity to prosecution for frauds committed before the date of bankruptcy. Accordingly, there is no federal interest served by preventing the State from going forward with its prosecution of [Davis] for issuing worthless checks. The potential conflict between the Bankruptcy Code and the sentencing provisions of the Delaware Code arises only if the State obtains a conviction, and the Court imposes a sentence of restitution notwithstanding Plaintiff's assertion of [his] federal rights. I cannot presume that either result will take place, and will therefore abstain under Younger.
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> For the reasons herein stated, the judgment of the Bankruptcy Court will be affirmed." In The Matter of Davis, 18 B.R. 701, 703-704 (D.Del. 1982).

Judge Stapleton's cautionary language gave fuel to Davis' opinion that, although a battle had been lost, the war might still be won. Thus, he appealed Judge Stapleton's decision to the Third Circuit Court of Appeals. Once again, his appeal was unsuccessful. But the Court of Appeals, in its opinion, again raised the Supremacy Clause issue:

> "As the Supreme Court stated in Younger, it is a 'basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.' 401 U.S. at 43-44, 91 S.Ct. at 750. [Davis contends] that the legal remedy is inadequate because, if Marvin Davis is convicted of issuing bad checks, the state court would impose a mandatory restitution penalty in contravention of the bankruptcy court's discharge order and the Bankruptcy Code policy of providing debtors with a fresh start. The imposition of

such a penalty may indeed raise serious questions under the Supremacy Clause of the United States Constitution, although we do not reach that question today. [Davis has] put forth no evidence that Marvin Davis will be unable to raise the Supremacy Caluse challenge in the state court. We decline to presume that the judges of Delaware will disregard the obligation imposed upom them by the federal Constitution. Cf. Kugler v. Helfant, 421 U.S. 117, 127, 95 S.Ct. 1524, 44 L.Ed.2d 15 (1975).

[Davis also appears] to argue that [he] will suffer irreparable injury from the state proceedings. However, the 'cost, anxiety, and inconvenience' of defending oneself in a good faith criminal prosecution does not constitute irreparable injury. Younger v. Harris, 401 U.S. at 46, 91 S.Ct. at 751. See also, Watson v. Buck, 313 U.S. 387, 400, 61 S.Ct. 962, 966, 85 L.Ed. 1416 (1941); Beal v. Missouri Pacific Railroad Corp., 312 U.S. 45, 49, 61 S.Ct. 418, 420, 85 L.Ed. 557 (1941); Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). If a state prosecution is brought in bad faith or for purposes of harassment, the federal court can, under Younger, enjoin the criminal proceedings. 401 U.S. at 54, 91 S.Ct. at 755; Kugler v. Helfant, 421 U.S. at 124, 95 S.Ct. at 1530. The bankruptcy court found that '[t]he mandatory restitution aspect of 11 Del.C., §4206(a) was the principle reason each individual creditor filed a criminal complaint.' Davis v. Sheldon (In re Davis), supra, at 443. [Davis contends] that inasmuch as the creditors were motivated by a desire to collect on a dischargeable debt, rather than by a sense of public duty, the criminal proceedings were brought in bad faith and thus are fatally tainted.

[Davis does] not argue that the state lacks a legitimate interest in protecting its citizens against the issuance of bad checks nor [does he] allege that the state Attorney General, who is prosecuting this case, is proceeding in bad faith. [He asserts] that it was improper for the state to act upon these claims because there was no state interest being protected; only the financial interest of the creditors was furthered. The state, however, is prosecuting the criminal actions on behalf of all of the citizens of Delaware, to protect the integrity of commercial transactions within the state. [Davis has] made no showing that the Attorney General had any reason to doubt the validity of the charges, that he failed to exercise independent judgment in continuing these

prosecutions, or that the complaining witnesses had insufficient evidence to support their allegations. We cannot require a prosecutor to conduct a searching inquiry into the public spirit of the victim of a crime before proceeding with what appears to be an otherwise valid criminal prosecution. Under these circumstances, the intentions of the complaining witnesses are not controlling in judging the good faith of a criminal prosecution. See generally, Allee v. Medrano, 416 U.S. 802, 836-38, 94 S.Ct. 2191, 2210-11, 40 L.Ed.2d 566 (1974) (opinion of Chief Justice Burger); Lewis v. Kugler, 446 F.2d 1343, 1348-49 (3d Cir. 1971). The processing of a bona fide criminal proceeding does not itself constitute irreparable injury in this case. If an order of restitution is ultimately issued against Marvin Davis, it will be appealable. If no such order is issued, the rights of [Davis[under the Bankruptcy Code will not have been affected. . . .

In addition to principles of equity, a federal court must consider 'the notion of ''comity,'' that is, a proper respect for state functions, a recognition of the fact that the entire Country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.' Younger v. Harris, 401 U.S. at 44, 91 S.Ct. at 750. A federal court should be especially cautious in enjoining state criminal proceedings, because of the state's paramount interest in protecting its citizens through its police power. In this case, there has been no showing that Delaware has acted in bad faith in its prosecution, nor any allegation that the Delaware courts have inadequate procedures for hearing the federal challenges to a judgment of restitution. Therefore, we cannot say that the bankruptcy court erred in refusing to interfere with the state court proceedings." In the Matter of Davis, 691 F.2d 176 (3d Cir. 1982).

Having followed the case through the federal courts, we now return to the Court of Common Pleas so as to ascertain what happened with the criminal prosecutions. Were convictions obtained and did the Court, over the constitutional arguments of defense counsel, order restitution and thus, perhaps, implicate the Supremacy Clause?

Rather incredibly, the actual turn of events caused not a stir in the courthouse. Without a constitutional whimper, the defendant entered a plea of guilty to one of the charges of Issuing a bad check, in return for which the State entered nollo prosequis with regard to the other charges. Under the plea bargain, Davis agreed to make full restitution on all the worthless checks he had issued and for which charges had been lodged. Thus, we are left with no definitive answer to the Supremacy Clause issue.

Yet, because 11 Del.C., §§900 and 4206(a) are criminal statutes properly enacted by the General Assembly of the State of Delaware so as to promote a legitimate interest in protecting Delaware's citizens against the issuance of bad checks, and because it is a legitimate interest of the State to make a victim of crime whole in so far as is possible.[5] and because these laws are intended to promote the integrity of commercial transactions within the State through the criminal prosecution of offenders thereof, I believe it to be unlikely that the Supremacy Clause would be implicated through ensuring the enforcement of a court's proper and legitimate sentencing order. A sentence whereby a defendant is ordered to pay restitution may be viewed as rehabilitative in nature, a legitimate function of the sentencing process.

In the case of Wise v. Ritter, 25 B.R. 440 (E.D.Va. 1982), Wise had failed to pay the Commonwealth of Virginia withholding taxes due for his employees. He was arrested and charged with the

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[5]See, for example, 11 Del.C., §4106.

crime of willfully failing to pay these taxes. He entered a plea of guilty in a Virginia state court. The court sentenced Wise to 60 days incarceration, suspended on condition that Wise pay the Department of Taxation $250 per month towards retiring the debt. Wise failed to make the first payment when it was due. Thereafter, the sentencing judge issued a capias for Wise's arrest. Before the capias was issued but after the first payment had become due, Wise filed for bankruptcy and, in connection with the bankruptcy case, sought an injunction to prohibit Virginia officials from proceeding to have his suspended sentence revoked. The Bankruptcy Court denied the petition for an injunction, stating:

> "Bankruptcy courts should not be used as havens for individuals who seek to escape sentences imposed by other courts. Once a court has determined an individual is guilty and has put that person on terms in lieu of a jail sentence, he should not be permitted to frustrate that prosecution through the filing of a petition in bankruptcy."

See also In re H. Cohen Caterers, Inc., 26 B.R. 1 (W.D.Ky. 1981); United States v. Jacobson, 35 B.R. 40 (D.Ariz. 1983).

It is my opinion, therefore, that, with regard to any defendant who has filed a petition in bankruptcy, a Justice of the Peace Court may attempt to enforce its sentencing order for the collection of a fine which may include restitution where appropriate or mandatory, or, as an alternative and where applicable, to utilize the sentencing options as provided by 11 Del.C., §4105(b). I conclude that a capias may be issued with regard to a defendant who has filed a petition in bankruptcy and who has failed to comply with a court's sentencing order as a means to bring such defendant before the court for a violation of probation hearing, or otherwise,

or to place said defendant upon work referral as permitted under 11 Del.C., §4105(b),[6] or to simply ensure compliance with the original sentencing order.

If the conclusion I reach herein is in error, the defendant will have recourse by filing a writ of prohibition, or the like, in the Superior Court. If such an appeal is taken from a particular sentence, you should stay the execution of said sentence until the appeal is decided in your favor. Further, if the Bankruptcy Court should enjoin the Court from carrying out a particular sentence, an unlikely event in light of Bankruptcy Judge Balick's decision in the Davis case, supra, clearly you must pay heed to the injunction.

NAB:pn

cc: The Honorable Daniel L. Herrmann
The Honorable Grover C. Brown
The Honorable Albert J. Stiftel
The Honorable Robert H. Wahl
The Honorable Robert D. Thompson
The Honorable Alfred Fraczkowski
The Honorable Charles M. Oberly, III
Lawrence M. Sullivan, Esquire
Eugene M. Hall, Esquire
O. Francis Biondi, Esq., Pres., Delaware State Bar Assoc.
Professor William J. Conner, Delaware Law School
Michael E. McLaughlin, Court Administrator
John R. Fisher, Director, Administrative Office of the Courts
Law Libraries: New Castle, Kent and Sussex Counties
Files

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[6]Should such a defendant fail to comply with a work referral order, such a defendant may be held in civil contempt. See 11 Del.C., §4105(b); 10 Del.C., §9506.

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PATRICIA WALTHER GRIFFIN
CHIEF MAGISTRATE

LEGAL MEMORANDUM 80-26 (2nd SUPPLEMENT)

TO: ALL JUSTICES OF THE PEACE

FROM: PATRICIA W. GRIFFIN
CHIEF MAGISTRATE PWG

DATE: JANUARY 31, 1995

RE: BANKRUPTCY

Attached are answers to questions typically asked by State Trial Court Judges prepared by the American Bankruptcy Institute. If you have any additional questions on this material, please let me know.

PWG/crm
cc: The Honorable E. Norman Veasey
The Honorable Randy J. Holland
The Honorable Henry duPont Ridgely
The Honorable Arthur F. DiSabatino
The Honorable Vincent J. Poppiti
The Honorable Alfred R. Fraczkowski
All Justice of the Peace Court Clerks
Thomas W. Nagle
Anna A. Lewis
John Betts
Law Libraries: New Castle County, Kent County, Sussex County,
Widener University School of Law
~~Digilaw, Inc~~.

FROM: STATE-FEDERAL JUDICIAL OBSERVER
December 1994

What State Judges Need to Know About Bankruptcy Cases

Bankruptcy cases create a major area of friction between state and federal courts—especially bankruptcy stays of state court lawsuits. Much of the friction arises because state trial judges lack understanding of the nature, extent, and effects of "automatic stays" under the U.S. Bankruptcy Code. The American Bankruptcy Institute is a private, nonprofit organization in Washington, D.C., devoted to education and research on bankruptcy issues. It has identified eleven questions commonly asked by state judges about bankruptcy stays and has developed answers to these questions.

The questions and answers as supplemented or developed by the Federal Judicial Center are presented below. Elaboration to some of the answers has been provided by Bankruptcy Judge Sidney B. Brooks (U.S. D. Colo.). More detailed information about bankruptcy issues can be found in the American Bankruptcy Institute's recent publication, *Bankruptcy Issues for State Trial Court Judges 1993*, developed through a grant from the State Justice Institute. Copies of this publication ($10 each) can be obtained from the American Bankruptcy Institute, 510 C Street N.E., Washington, DC 20002, phone: (202) 543-1234. (*Note:* Some of the information in the publication may have been affected by recent changes in the bankruptcy laws.)

1. Question: What sort of actions, motions, and proceedings in state court are not stayed by a bankruptcy filing?

Answer: Certain actions are excluded by statute from the operation of the automatic stay. The following are common ones: most criminal actions against the debtor; alimony, maintenance, or support collection actions from property other than property of the bankruptcy estate (e.g., collections from property acquired after the debtor files a chapter 7 petition); paternity actions; and police or regulatory enforcement actions (e.g., consumer protection and environmental actions). The statutory exceptions from application of the stay appear at 11 U.S.C. § 362(b).

2. Question: Could a state court judge action violate a bankruptcy stay?

Answer: Yes. While it is more likely that a party or counsel for a party would be acting contrary to the automatic stay, a state court judge could violate it in a myriad of ways, ranging from conducting a pretrial conference in a mortgage foreclosure action to a trial of a contract dispute. Essentially any act outside the bankruptcy court that moves a matter forward on a claim against a debtor or property of the estate during the pendency of a bankruptcy violates the stay. As a practical matter, however, only acts in willful violation of the stay would result in sanctions, from which state court judges would probably be immune.

There are several areas where the automatic stay does not apply, and thus a state court judge may act. See answer to Question #1.

Determining what is not covered by the stay can be tricky. When in doubt, the state judge should refrain from going forward and advise the parties to obtain relief from the stay in the bankruptcy court. The process to do so is relatively swift and self-executing, if not opposed. It is usually treated on a relatively expedited basis.

The stay otherwise expires automatically on the closing or the dismissal of the case, or when a discharge is entered. Typically a discharge is entered about 100 days after an uncomplicated chapter 7 case is filed or at the successful conclusion of a chapter 13 plan.

Note: If a defendant files for bankruptcy shortly before the commencement of a state court action, quick relief from the stay might be obtained by the other litigants if they immediately apply to the bankruptcy court and justify prompt modification of the stay. Bankruptcy judges are not likely to condone unfair litigation tactics, and they may wish to abstain in favor of a case being better tried in a state court.

3. Question: In a lawsuit before a state judge, three defendants are alleged to be joint tortfeasors. The state law provides for percentage apportionment of liability. One of the three defendants files bankruptcy.

(a) Can the case proceed?

(b) Should it?

Answer: (a) Maybe. In a state that apportions liability by percentage, the case against three joint tortfeasors could proceed against two of them after the third files bankruptcy. If the state law requires that joint tortfeasors be tried together, then the case could not proceed against any of the tortfeasors unless the bankruptcy court grants relief from the stay.

(b) No. The case should not proceed until the plaintiff or a codefendant obtains relief from the automatic stay.

4. Question: (a) A defendant in a tort suit files bankruptcy. All parties before the state judge acknowledge that the defendant is covered by insurance and that the liability of the defendant will be limited by the extent of the coverage. Does the state judge need a bankruptcy court order to proceed with the tort action while the bankruptcy case is pending?

(b) Once the discharge injunction has been entered and the bankruptcy case closed, may the plaintiff in the tort action proceed against the debtor in state court as a nominal defendant if such action is necessary to prove liability as a prerequisite to recovery from the liability insurer?

Answer: (a) Yes. Even in tort cases where a defendant is insured and liability is limited to the extent of the coverage, a party should seek an order granting relief from the automatic stay or remove any doubt about the effects of proceeding with the action. (See also answer to Question 3.)

(b) Yes. The discharge of the debtor extinguishes personal liability but does not release third persons, including insurance companies, from liability. No modification of the discharge injunction entered by the bankruptcy court is necessary, if such action is necessary to prove liability as a prerequisite to recovery from the liability insurer.

5. Question: (a) Can the bankruptcy court reexamine or undo awards of child support.

See BANKRUPTCY, page 3

Inside . . .

BANKRUPTCY, from page 1

alimony, or attorney fees made in a divorce action?

(b) If so, to what extent?

Answer: (a) Yes. Since support and alimony awards are generally nondischargeable, questions often arise about the characterizations or labels of those awards (as well as attorney fee awards) and their relation to property settlement obligations, which are generally dischargeable, except as provided for in 11 U.S.C. § 523(a)(15).

(b) Bankruptcy courts will not be bound by the characterizations or labels given to the debts in a state decree or settlement. Accordingly, bankruptcy courts may undo such state court awards if their characterizations are inconsistent with the parties' true intentions and dischargeability rights.

6. Question: (a) Once a party to a lawsuit before a state judge has filed bankruptcy, can one or more of the parties remove the entire lawsuit or part of it to the bankruptcy court for determination?

(b) Can the bankruptcy court remand the action back to the state judge for determination?

Answer: (a) Yes. All or part of the state court lawsuit can be removed.

(b) Yes. The bankruptcy judge will likely remand state lawsuits that are traditionally determined in state court.

7. Question: (a) What state court judgments are nondischargeable under the different bankruptcy chapters?

(b) Can such nondischargeable judgments be collaterally attacked in the bankruptcy court?

Answer: (a) Examples of final state court judgments that may be nondischargeable in a subsequent chapter 7 case of an individual debtor include the following: money judgments based on fraud, embezzlement, larceny, willful or malicious injury to the person or property of another; and money judgments for death or personal injury arising for intoxicated driving incidents. The reorganization chapters (11, 12, and 13) generally provide broader discharge opportunities than are available to chapter 7 debtors.

A creditor who desires to have his or her claim or judgment against a debtor excepted from the debtor's discharge should initiate an adversary proceeding in bankruptcy court to have the claim adjudicated. Certain adversary proceedings must be brought in bankruptcy court within a specified time. 11 U.S.C. § 523(c)(1). The state court has concurrent jurisdiction to determine the discharge ability of certain debts. A creditor's failure to initiate an adversary proceeding, particularly where some type of wrongdoing is alleged (fraud, willful and malicious injury, etc.), is likely to result in a discharge of that judgment.

Note: A state court judgment that is based on specific and appropriate findings of fact and conclusions of law is more likely to be adopted by, or otherwise served to estop collaterally, the bankruptcy court when the court is presented with the issue of dischargeability of that judgment.

(b) Yes. Default judgments or issues not fully litigated in state court are subject to collateral attack in bankruptcy court, but collateral estoppel applies in bankruptcy proceedings to matters that have been fully litigated in state courts.

8. Question: If a debtor files a chapter 13 bankruptcy, can he or she discharge judgments for embezzlement, fraud, intentional torts, and driving under the influence of alcohol and drugs?

Answer: Money judgments based on driving while intoxicated are not dischargeable in chapter 13, but money judgments for embezzlement, fraud, and intentional torts are. In chapter 13 proceedings, debtors usually agree to pay creditors from future income over an extended period of time pursuant to a plan approved by the bankruptcy court. Such a debtor is not entitled to discharge until the successful completion of payments under the plan.

9. Question: Are there any circumstances where restitution or fines in a state criminal case are dischargeable?

Answer: Fines and restitution in state criminal cases are nondischargeable in bankruptcy cases filed on or after October 22, 1994. Both fines and restitution in state criminal actions are nondischargeable in chapter 7 cases filed before October 22, 1994. Restitution is nondischargeable, but fines are dischargeable in chapter 13 cases filed before that date.

10. Question: The defendant in a collection suit in state court affirmatively alleges discharge in bankruptcy. Can the state court resolve this issue, or is the dischargeability issue only within the jurisdiction of the bankruptcy court?

Answer: Only bankruptcy courts can determine whether to grant or deny a discharge in bankruptcy, but state court judges can ascertain whether discharge has in fact been granted or denied through evidentiary methods of proof.

11. Question: A lawyer for a party calls and advises the state judge that a client has filed bankruptcy. How can this be verified?

Answer: The state judge or his or her clerk may call the bankruptcy court clerk's office, or seek access to the docket electronically if such technology is available. Phone numbers for clerks' offices appear in the ABI publication referenced above and in the "Government Listings" of most telephone directories under United States Government, Courts, District Court for (Name of Federal District), Bankruptcy Court, Clerk's Office. An alternative is for the state judge to require the debtor's lawyer to file with the state court a date-stamped copy of the debtor's filed bankruptcy petition, and/or the Official Bankruptcy Form 9, "Notice of Filing Under the Bankruptcy Code, Meeting of Creditors and Fixing of Dates," after such form has been issued by the bankruptcy court. ❑

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LEGAL MEMORANDUM 80-26 (3RD SUPPLEMENT)

TO: ALL JUSTICES OF THE PEACE
ALL JUSTICE OF THE PEACE CRIMINAL COURTS

FROM: PATRICIA W. GRIFFIN
CHIEF MAGISTRATE

DATE: MAY 7, 1999

RE: BANKRUPTCY: EFFECT OF AUTOMATIC STAY IN CHAPTER 13 CASES ON CRIMINAL FINES/RESTITUTION

Legal Memoranda 80-26 (Supplement), Automatic Stay Provision of the Federal Bankruptcy Act, Barron, C.M. (August 20, 1984) is hereby rescinded. Please destroy your copy.

A recent bankruptcy case involving the Justice of the Peace Court should serve as a reminder that when a criminal defendant has filed a petition for bankruptcy, the automatic stay prevents any attempts at debt collection, including attempts to collect the monetary payment of criminal fines, costs and penalties.

The case was heard before the Bankruptcy Court for the District of Delaware and involved a defendant who had been sentenced in the Justice of the Peace Court to pay fines for traffic violations. After failing to meet his payment schedule, the Justice of the Peace Court ordered him to work referral but the defendant failed to fulfill his work referral obligation. Thereafter, a capias was issued for civil contempt. In the meantime, the defendant had filed for bankruptcy under Chapter 13.[1] The defendant was arrested for new traffic offenses and was

[1] Chapter 13 involves the development of a payment plan for full or partial payment of creditors by individuals with regular income. It does not involve an asset liquidation as under Chapter 7. A number of differences apply between the various bankruptcy chapters which may impact on the issues discussed in this memorandum.

incarcerated for a few days until bail was paid. The new charges were transferred to the Court of Common Pleas and a hearing was scheduled in the Justice of the Peace Court on the civil contempt. Prior to the hearing, the defendant filed a motion for a preliminary injunction with the Bankruptcy Court, claiming that the Justice of the Peace Court civil contempt hearing should be stayed because it could only result in an attempt to collect the traffic fines in violation of the automatic stay.

The Justice of the Peace Court argued that, pursuant to 11 U.S.C. §362(b)(1), the hearing was the continuation of a criminal case which should not be stayed by the bankruptcy case and that the Justice of the Peace Court had the authority pursuant to 11 *Del.C.* § 4105 to apply non-monetary penalties for the defendant's failure to appear at work referral.

In a bench ruling, the Bankruptcy Court denied the motion to enjoin the Justice of the Peace Court hearing. **The Bankruptcy Court recognized that non-monetary penalties could be imposed at the hearing with regard to the pre-petition fines, but emphasized that if the outcome of the hearing would be to enforce, affirm, or ratify any collection action for a fine which arose before the filing of the bankruptcy case, in violation of the confirmed plan, that the action of the Justice of the Peace Court would be void and the Bankruptcy Court would reverse it.**

The Bankruptcy Court's holding was consistent with the caselaw in this area. The following question and answer format should serve as a review of this caselaw:

MAY THE COURT COLLECT CRIMINAL FINES FROM A DEFENDANT WHO HAS FILED A CHAPTER 13 BANKRUPTCY SINCE THE TIME THE FINES WERE IMPOSED?

Upon the filing of a bankruptcy petition, 11 U.S.C. § 362(a) prohibits the continuation or commencement of judicial actions against the debtor, the enforcement of pre-petition judgments, or other acts to collect a pre-petition claim. *In the Matter of Cuevas*, 205 B.R. 457, 459 (Bankr. D. N. J. 1997). However, 11 U.S.C. § 362(b)(1) provides an exemption to the automatic stay for the continuation of criminal proceedings. Under this exemption, criminal proceedings may be held even though the defendant is in bankruptcy **as long as the proceedings are not an effort to collect a pre-petition fine or restitution prior to, or in violation of, a confirmed Chapter 13 plan.** As stated by the Ninth Circuit in *Hucke v. State of Oregon*, 992 F. 2d 950, 953 (9th Cir. 1993), *cert den.* 510 U.S. 862, 114 S. Ct. 178, 126 L. Ed. 2d 137 (1993):

> An exception to the automatic stay provisions provides that the stay does not apply to "the commencement or continuation of a criminal action or proceeding against a debtor." 11 U.S.C. § 362(b)(1). Certainly, the mere institution of a probation revocation proceeding, without more, would constitute a continuation of a criminal action against the defendant/debtor and, thus, be exempt from the automatic stay (as distinguished from a civil debt collection action, which could not be instituted nor continued after the stay went into effect). However, if the probation hearing had as its aim the collection of the fine, then it would run afoul of § 362(a)(6), which stays acts intended to "collect, assess or

> recover a claim" against the debtor. In sum, if the present state revocation proceeding constituted collection efforts, then it would violate the automatic stay and would be void. On the other hand, if that proceeding were not a collection effort, then it would be a "continuation of a criminal action or proceeding against a debtor" and exempt from the stay. [2]

Hucke, 992 F. 2d at 953.

If a criminal proceeding is designed to collect pre-petition fines or restitution prior to, or in violation of, a confirmed Chapter 13 plan, the proceeding may be enjoined by the Bankruptcy Court. *See Davis v. Sheldon,* 659 F. 2d 176, 178 (3rd Cir. 1982) (declining to enjoin state court action but stating that if a state prosecution is brought for purposes of harassment, a federal bankruptcy court can enjoin state criminal proceedings); *Howard v. Allard*, 122 B.R. 696, 699 (W.D. Ky. 1991) (stating that bankruptcy courts should enjoin criminal proceedings initiated for debt collection purposes).

ARE CRIMINAL FINES AND RESTITUTION DISCHARGEABLE IN BANKRUPTCY?

The Bankruptcy Code provides in 11 *Del.C.* § 1328(a)(3) that criminal fines and restitution are nondischargeable.[3] However, costs may be dischargeable as they do not fit directly within this exception.

WHAT DOES NONDISCHARGEABLE MEAN?

Nondischargeable means that the debtor will still be liable for any remaining amount of the debt (in this case criminal fines and/or restitution) once he or she otherwise obtains a discharge in bankruptcy. **Even though a debt is nondischargeable, the automatic stay does apply to its collection.** This distinction was explained by the District Court in *Walters v. Sherwood Municipal Court*, 219 B.R. 520, 528 (Bankr. W.D. Ark. 1998) as follows:

> The Bankruptcy Code is clear that fines and restitution imposed in connection with a criminal judgment are nondischargeable, even in a Chapter 13 case. 11 *U.S.C.* § 1328(a)(2). The nondischargeability of the debt, however, does not in any manner obviate the effect or the imposition of the automatic stay. Section 362(b), which provides for exceptions to the automatic stay, does not include a provision for permitting collection of nondischargeable debts. The nondischargeability of the debt means that the debtor remains liable for that debt,

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[2] There is some earlier caselaw to the contrary (mainly involving Chapter 11 cases or restitution prior to the statutory change which made restitution nondischargeable). *See* 9A Am Jur 2d *Bankruptcy* § 1446 and cases cited therein. However, the bench ruling of the Bankruptcy Court for the District of Delaware in the Justice of the Peace Court case made it clear that, in the District of Delaware, any attempt to collect criminal fines/restitution will constitute a violation of the automatic stay.

[3] In Delaware, traffic violations are criminal in nature. *See Angelini v. Court of Common Pleas*, Del. Supr., 205 A. 2d 174, 175 (1964) (referring to prosecutions for traffic offenses as criminal). Thus, traffic fines fall within the criminal fines exception to dischargeability. Traffic fines may not fall within this exception in other jurisdictions. *See, e.g. Burkhardt*, 220 B.R. 837, 849 (Bankr. D. N.J. 1998) (finding that traffic fines were dischargeable in a Chapter 13 plan).

incarcerated for a few days until bail was paid. The new charges were transferred to the Court of Common Pleas and a hearing was scheduled in the Justice of the Peace Court on the civil contempt. Prior to the hearing, the defendant filed a motion for a preliminary injunction with the Bankruptcy Court, claiming that the Justice of the Peace Court civil contempt hearing should be stayed because it could only result in an attempt to collect the traffic fines in violation of the automatic stay.

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The Bankruptcy Code provides in 11 *Del.C.* § 1328(a)(3) that criminal fines and restitution are nondischargeable.[3] However, costs may be dischargeable as they do not fit directly within this exception.

WHAT DOES NONDISCHARGEABLE MEAN?

Nondischargeable means that the debtor will still be liable for any remaining amount of the debt (in this case criminal fines and/or restitution) once he or she otherwise obtains a discharge in bankruptcy. **Even though a debt is nondischargeable, the automatic stay does apply to its collection.** This distinction was explained by the District Court in *Walters v. Sherwood Municipal Court*, 219 B.R. 520, 528 (Bankr. W.D. Ark. 1998) as follows:

> The Bankruptcy Code is clear that fines and restitution imposed in connection with a criminal judgment are nondischargeable, even in a Chapter 13 case. 11 *U.S.C.* § 1328(a)(2). The nondischargeability of the debt, however, does not in any manner obviate the effect or the imposition of the automatic stay. Section 362(b), which provides for exceptions to the automatic stay, does not include a provision for permitting collection of nondischargeable debts. The nondischargeability of the debt means that the debtor remains liable for that debt,

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[2] There is some earlier caselaw to the contrary (mainly involving Chapter 11 cases or restitution prior to the statutory change which made restitution nondischargeable). *See* 9A Am Jur 2d *Bankruptcy* § 1446 and cases cited therein. However, the bench ruling of the Bankruptcy Court for the District of Delaware in the Justice of the Peace Court case made it clear that, in the District of Delaware, any attempt to collect criminal fines/restitution will constitute a violation of the automatic stay.

[3] In Delaware, traffic violations are criminal in nature. *See Angelini v. Court of Common Pleas*, Del. Supr., 205 A. 2d 174, 175 (1964) (referring to prosecutions for traffic offenses as criminal). Thus, traffic fines fall within the criminal fines exception to dischargeability. Traffic fines may not fall within this exception in other jurisdictions. *See, e.g. Burkhardt*, 220 B.R. 837, 849 (Bankr. D. N.J. 1998) (finding that traffic fines were dischargeable in a Chapter 13 plan).

> despite obtaining a discharge in bankruptcy. *See* 11 *U.S.C.* § 1328. The obligation to pay restitution, costs and fines is a debt recognized by the Bankruptcy Code, but any effort to collect, other than as permitted by the Bankruptcy Code, is a violation of the automatic stay, whether or not the debt is dischargeable. Thus, the fact that Michelle Walters' prepetition restitution debt is nondischargeable does not permit the Sherwood Municipal Court to continue to maintain a warrant, or arrest Michelle Walters.

Walters, 219 B.R. at 528.

WHAT SHOULDN'T A COURT DO IN A CRIMINAL PROCEEDING WITH REGARD TO PRE-PETITION FINES/RESTITUTION?

Once the Court receives notice of the filing of a bankruptcy petition, the Court **should not attempt to collect the pre-petition fines or restitution while the defendant is in bankruptcy, except in accordance with a confirmed Chapter 13 plan.** The Court should ensure that there are no capiases/warrants outstanding against the defendant related to pre-petition fines or restitution. If, for some reason, a defendant in bankruptcy is arrested for failure to pay pre-petition debt, the Court should release the defendant immediately without any condition of monetary payment at that time. *See, e.g., Walters v. Sherwood Municipal Court*, 219 B.R. at 520.

WHAT KIND OF NOTICE IS REQUIRED TO TRIGGER THE COURT'S RESPONSIBILITIES WITH REGARD TO A DEFENDANT'S BANKRUPTCY?

The automatic stay "arises irrespective of whether the parties stayed are aware that a petition has been filed or whether the debtor is aware that the stay halts a particular matter." *D'Alfonso v. A.R.E. Investment Corp.*, 211 B.R. 508, 513-14 (Bankr. E.D. Pa. 1997). Thus, any action taken in violation of the automatic stay is void whether or not the creditor had notice of the bankruptcy filing. For this reason, after receiving <u>any</u> notice of the bankruptcy, no matter how informal, (such as a defendant's mention of the bankruptcy during a hearing or even a phone call from the defendant prior to the hearing), the Court has an affirmative duty to ascertain the correctness of the information. *Walters*, 219 B.R. at 526; *In re Stewart*, 190 B.R. 846 (Bankr. C.D. Ill. 1996) ("Once a party is put on notice of a bankruptcy filing, he is under a duty to seek further information which should reveal the applicability and scope of the automatic stay.") If there is nothing in the Court's files regarding the bankruptcy, the Justice of the Peace Court should ask the defendant to provide proof and, if proof is not provided, should call the Bankruptcy Court to ascertain whether the defendant has filed a bankruptcy petition.[4]

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[4] The automatic stay applies even if the creditor was not listed in the debtor's chapter 13 schedule. *Figgers v. Dayton Power and Light Employees Federal Credit Union*, 121 B.R. 772, 775 (Bankr. S.D. Ohio 1990). If a debtor does not list a creditor in the Chapter 13 filing, most cases have held that the debt of that creditor will not be discharged in the bankruptcy. *Kristiniak*, 208 B.R. 132, 135 (Bankr. E.D. Pa. 1997). Although criminal fines/restitution are nondischargeable in any event, the debtor has an incentive to list fines/restitution so that the court will file a proof of claim, or, in the event the court fails to do so, the debtor can file a proof of claim for the court. The proof of claim permits the debtor to pay the debt as part of the plan and thus helps to prevent the debtor from being left with the full amount of the nondischargeable debt to be paid after the case is closed. *See* 11 *U.S.C.* § 501, Revision Notes and Legislative Reports.

Any notice of bankruptcy regarding a defendant received by the Court should be shown to the judge who will take the appropriate action (see above). In addition, please make certain that a copy of the notice is sent to Mario Spitelli in the Administrative Office and that a copy is retained in the court's own file. **Also, any formal or informal notice that the defendant is in bankruptcy must be entered into the bail notes and the account receivables notes in the DELJIS case file, and highlighted, if possible. In addition, any payment due dates should be delayed for an extended period (1 year, or such other time as the bankruptcy is likely to be completed) to prevent the issuance of additional capiases.**

WHAT MAY A COURT DO WITH REGARD TO A CRIMINAL DEFENDANT WHO HAS FILED A BANKRUPTCY PETITION?

While a court may not seek to collect any pre-petition fines or restitution except as may be permitted under a confirmed Chapter 13 plan, the caselaw indicates that a court may impose other penalties on the defendant/debtor which are appropriate under state law. *See, e.g., In the Matter of Cuevas*, 205 B.R. at 459-60 (finding that a prison sentence could be imposed as an alternative to a fine as permitted by New Jersey law because the incarceration was intended as an alternative punishment, not as a means to collect a debt). *See also In the Matter of Sims*, 101 B.R. 52, 54 (Bankr. W.D. Wis. 1989); *Hucke*, 992 F. 2d at 954; *Gilliam v. Metropolitan Gov't of Nashville,* 67 B.R. 83 (Bankr. M.D. Tenn. 1986).

Delaware law permits a number of measures which may be employed with regard to a criminal defendant who has filed a bankruptcy petition. If the bankruptcy filing occurs after a defendant has been sentenced to pay a fine and the Court learns of the bankruptcy through a notice from the Bankruptcy Court or from the defendant, the Court may either take no action or schedule a hearing to determine whether work referral should be ordered pursuant to 11 *Del.C.* § 4105. In either situation, the Court should be sure that any capiases for non-payment of fines are cancelled and that information on the bankruptcy filing is included in the case file. (Capiases for unrelated offenses should not be cancelled.)

If, at the time of the original sentencing, the defendant has already filed a bankruptcy petition, the Court may impose a sentence of incarceration, if appropriate to the offense. If a fine (and restitution) are appropriate, the Court may impose them and order work referral for their payment or suspend the fine for probation and community service or simply order community service. Alternatively, the Court may simply impose the fine and order it paid subject to the bankruptcy plan.[5]

If the defendant fails to comply with any non-monetary penalties which have been imposed, the Court may impose the sanctions provided by law for failure to comply with work referral, failure to comply with a community service order, or violation of probation, as appropriate. In this situation, any notice of a hearing related to the court's knowledge of

[5] If a proof of claim is filed by either the Court or by the debtor on behalf of the Court, payments to the Court may be included in the plan. However, if a proof of claim is not filed, whatever amount of the fine or restitution which has not been paid will still be owed upon the completion of the bankruptcy case.

defendant's non-compliance with the order should specify that the hearing is being held pursuant to the defendant's failure to comply with work referral, community service, or probation.

MAY THE COURT IMPOSE FINES AFTER THE DEFENDANT HAS FILED BANKRUPTCY?

Yes. The automatic stay addresses only the collection of fines, not their imposition.

MAY THE COURT COLLECT FINES WHICH WERE ASSESSED AGAINST THE DEBTOR AFTER THE FILING OF THE BANKRUPTCY PETITION?

The ability of the court to collect post-petition fines depends upon the status of the bankruptcy case. If the Chapter 13 petition has been filed, but the plan has not yet been confirmed, the automatic stay prohibits efforts to collect a post-petition fine because the stay bars collection actions against the property of the estate regardless of whether the debt arose before or after the filing of the bankruptcy. *In re Leavell*, 190 B.R. 536, 538 (Bankr. E.D. Va. 1995). (Property of the estate in a Chapter 13 case includes earnings performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to another chapter. *Leavell,* 190 B.R. at 538; 11 U.S.C. § 1306.) However, once the Chapter 13 plan is confirmed, the rule in the Third Circuit is that unless the plan provides otherwise, the property of the estate vests in the debtor upon confirmation and comes free and clear of any claim or interest of any creditor provided for by the plan. *Internal Revenue Service v. Norton*, 717 F. 2d 767, 774 (3rd Cir. 1993); *U.S. v. Continental Airlines,* 218 B.R. 324, 329 (D.Del. 1997) aff'd 134 F. 3d. 536 (3rd Cir. 1998) *cert. den.* 119 S. Ct. 336, 142 L. Ed. 2d 277 (1998). Thus, the collection of post-petition fines after confirmation of the plan does not violate the automatic stay. *See City of Chicago v. Fisher*, 203 B.R. 958, 964 (N.D. Ill. 1997) (impounding of Chapter 13 debtor's car for non-payment of post-petition fines after confirmation of plan did not violate the automatic stay; car was property of the estate prior to the plan's confirmation, but vested in the debtor upon the confirmation); *Leavell,* 190 B.R. at 538 (collection of post-petition consumer debts by retailer following confirmation of the Chapter 13 plan did not violate the automatic stay).

IN SUMMARY

The following procedure should be followed upon the Court learning that a defendant has filed a bankruptcy petition:

1. Determine through the defendant or the Bankruptcy Court the status of the bankruptcy petition.

2. If the fines/restitution were assessed after the Chapter 13 plan was confirmed, the Court may pursue collection of the fines. If not, the automatic stay prohibits collection of any debts, including fines, costs and restitution, except as permitted under a confirmed Chapter 13 plan, until the bankruptcy proceeding is completed.

3. If the defendant's criminal case is currently pending (without judgment) in the Court, the Court may impose all statutorily-authorized penalties, including fines, but may not collect them except as permitted under a confirmed Chapter 13 plan.

4. The clerk should note and highlight the bankruptcy information in both the bail and account receivables notes in DELJIS.

5. Any outstanding capias/warrant for the failure to pay a fine/restitution, should be removed.

6. Any payment due dates should be delayed for an extended period (1 year, or such other time as the bankruptcy is likely to be completed) to prevent the issuance of additional capiases.

7. Any notices related to the bankruptcy should be placed in the case file and **copies sent to Mario Spitelli in the Administrative Office.**

Finally, thanks go to Judge Petraschuk for his help with this memorandum.

PWG/crm

cc: Honorable E. Norman Veasey
Honorable Randy J. Holland
Honorable Henry duPont Ridgely
Honorable Alex J. Smalls
Honorable Vincent J. Poppiti
Honorable Alicia Howard
Keith R. Brady, D.A.G.
All Delaware Police Agencies
All Justice of the Peace Courts
Alderman's Courts
Thomas W. Nagle
Anna A. Lewis
H. John Betts
Larry Sipple
Mario Spitelli
Donzel Harris, Administrative Office
Law Libraries: New Castle County, Kent County, Sussex County,
Widener University School of Law

STATE OF DELAWARE
JUSTICE OF THE PEACE COURTS

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PATRICIA WALTHER GRIFFIN
CHIEF MAGISTRATE

LEGAL MEMORANDUM 80-26 (4TH SUPPLEMENT)

TO: ALL JUSTICES OF THE PEACE
ALL JUSTICE OF THE PEACE CRIMINAL COURTS

FROM: PATRICIA W. GRIFFIN
CHIEF MAGISTRATE

DATE: MAY 7, 1999

RE: CONFIRMATION OF DEFENDANT'S BANKRUPTCY IN CIVIL CASES BEFORE THE JUSTICE OF THE PEACE COURT

The revised original legal memorandum on bankruptcy, dated May 21, 1981, is **amended** to the extent that it indicates that a civil proceeding shall not be stayed until the Justice of the Peace Court receives a copy of the bankruptcy petition. **Please retain your copy of that memorandum, but note on it that the middle paragraph on page 4 has been rescinded or cross out that paragraph.** As discussed below, if the court receives any indication that the defendant has filed a bankruptcy petition, the Court should check its files and if there is nothing there pertaining to the petition, ask the defendant for proof. However, if the defendant does not provide proof that a petition has been filed, the Court should only proceed if it verifies that no petition has been filed.

Section 362 of the Bankruptcy Code creates an automatic stay against "the commencement or continuation...of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case." *Rexnord Holdings, Inc., v. Bidermann*, 21 F. 3d. 522, 527 (2d Cir. 1994). "The stay is effective immediately upon the filing of the petition, and any proceedings or actions described in section 362(a)(1) are void and without vitality if they occur after the automatic stay takes effect." *Id. See also In the Matter of Cappadonna* 154 B.R. 639, 641 (Bankr. D. N.J. 1993). Furthermore, the automatic stay applies even if the debtor is not aware that the stay halts a particular matter. *D'Alfonso v. A.R.E. Investment Corp.*, 211 B.R. 508, 513-14 (Bankr. E.D. Pa. 1997).

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LEGAL MEMORANDUM 80-26 (5TH SUPPLEMENT)

TO: ALL JUSTICES OF THE PEACE
ALL JUSTICE OF THE PEACE COURTS

FROM: PATRICIA W. GRIFFIN
CHIEF MAGISTRATE

DATE: JUNE 11, 1999

RE: OBTAINING INFORMATION FROM BANKRUPTCY COURT

The third supplement to this memorandum states that if the defendant has indicated that he or she has filed a bankruptcy petition, that the justice of the peace should ask the defendant to provide proof and, if proof is not provided, should call the Bankruptcy Court to ascertain whether the defendant has filed a bankruptcy petition.

When you call the clerk's office at the Bankruptcy Court for the District of Delaware, the automatic phone system will give you a number to call through which you can determine whether the person before you has filed a bankruptcy petition. If you wish to avoid a step, you may call the number for bankruptcy filing information directly. That number is 888-667-5530.

In order to use the automated system, you will need to enter the name of the person. (Instructions are provided by the system.) Once you enter the name, the system will tell you whether it finds a match with the name. If it does not find a match, you can assume that there has not been a bankruptcy filing in that court by the person whose name you have entered. If there is a match, the system will tell you the type of filing (e.g., Chapter 11, Chapter 13), the date of the filing, the status of the case, the social security number of the debtor, and the name and phone number of the debtor's attorney to contact for any further information. You may want to contact the attorney, for example, if you have any doubt as to whether a match found by the automated system is actually the same person as the defendant in the Justice of the Peace Court.

The information provided through the above phone number is limited to filings in the District of Delaware. The phone numbers for the automated phone systems for other Bankruptcy Courts in the region are:

Maryland:	410-962-0733
New Jersey:	973-645-6044 or 6045
Pennsylvania: (Eastern District)	215-597-2244.

PWG/crm

cc: Honorable E. Norman Veasey
Honorable Randy J. Holland
Honorable Henry duPont Ridgely
Honorable Alex J. Smalls
Honorable Vincent J. Poppiti
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